

IN THE
Supreme Court of the United States

BRADLEY LITTLE, GOVERNOR OF IDAHO, *et al.*,
Petitioners,

v.

LINDSAY HECOX, *et al.*,
Respondents.

WEST VIRGINIA, *et al.*,
Petitioners,

v.

B. P. J., BY HER NEXT FRIEND
AND MOTHER, HEATHER JACKSON,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURTS OF APPEALS FOR THE NINTH AND FOURTH CIRCUITS

**BRIEF OF FEDERAL JURISDICTION
SCHOLARS AS *AMICI CURIAE* IN SUPPORT
OF RESPONDENTS AND DISMISSAL OF
THE WRITS OF CERTIORARI**

KENT GREENFIELD
BOSTON COLLEGE LAW SCHOOL
885 Centre Street
Newton, MA 02459

LAWRENCE S. LUSTBERG
Counsel of Record
MICHAEL R. NOVECK
RUTH O'HERRON
MADHULIKA MURALI
GIBBONS P.C.
JOHN J. GIBBONS FELLOWSHIP
IN PUBLIC INTEREST AND
CONSTITUTIONAL LAW
One Gateway Center
Newark, NJ 07102
(973) 596-4500
llustberg@gibbonslaw.com

Counsel for Amici Curiae

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INTEREST OF AMICI CURIAE¹

Amici curiae are legal scholars with expertise in federal courts, federal jurisdiction, and the Supreme Court and its procedure. This brief takes no position on the merits of these cases but addresses a procedural issue: whether the Court should dismiss the writs of certiorari as improvidently granted because the factual and legal record is not sufficiently complete to warrant the Court's review at this time. *Amici* have an interest, grounded in history and a scholarly understanding of this Court's jurisprudential principles, in the appropriate exercise of the Court's jurisdiction and application of its procedure. They offer this brief to assist the Court in determining whether it should decide the weighty issues presented by these cases on the undeveloped record before it.

Amici file this brief solely as individuals, and institutional affiliations are given for identification purposes only.

Kent Greenfield is Professor of Law and Thomas F. Carney Distinguished Scholar at Boston College Law School, where he teaches and studies the Supreme Court and constitutional law. He is the principal editor of the two Supreme Court volumes of Moore's Federal Practice.

Alexander A. Reinert is the Max Freund Professor of Litigation & Advocacy at Benjamin N. Cardozo School

1. Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *Amici* and their counsel made any monetary contribution to the preparation or submission of this brief.

of Law, where he teaches Federal Courts and Civil Procedure.

Julie C. Suk is Professor of Law and the Honorable Deborah A. Batts Distinguished Research Scholar at Fordham University School of Law. She teaches Civil Procedure and has authored two books and dozens of articles on constitutional law and Supreme Court procedure.

Joseph T. Thai is the Retired Watson Centennial Chair at the University of Oklahoma College of Law. He teaches and writes on constitutional law and the Supreme Court.

* * * * *

SUMMARY OF ARGUMENT

This Court has long viewed itself as “a court of final review and not first view.” *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) (quoting *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (per curiam)). That rule “promote[s] respect” for the adjudicatory process, *Adarand Constructors*, 534 U.S. at 110 (quoting *Adams v. Robertson*, 520 U.S. 83, 92 n.6 (1997) (per curiam)), and ensures that the Court does not frame “broad rules, seemingly sensible on one set of facts, which may prove ill-considered in other circumstances,” *Illinois v. Gates*, 462 U.S. 213, 224 (1983).

In contravention of these customary limitations on this Court’s discretion, Petitioners ask this Court to sit as one of “first view” in an interlocutory posture to decide novel

and important questions that require the application of the law to certain unproven facts.

Specifically, Petitioners seek interlocutory review of the application of the Fourteenth Amendment’s Equal Protection Clause to state laws barring transgender girls and women from participation on girls’ and women’s school sports teams, even though neither Court of Appeals below issued a final judgment on the Equal Protection claim—much less a decision in conflict with other Courts of Appeals or any of this Court’s precedents.² The appellate rulings—one in *B.P.J.* holding that genuine issues of material fact precluded summary judgment, and the other in *Hecox* affirming a preliminary injunction—represent only early stages of the litigation. In fact, both Courts of Appeals below remanded for further proceedings that would permit development of a full factual record to facilitate future review, including review by this Court at a later stage, if appropriate.

The interlocutory posture of these cases means that there is no way for this Court to decide the constitutional issues presented without relying on Petitioners’ claims about certain facts that are hotly contested in the lower courts and were not found as a final matter by any court below. In particular, the assertion that transgender

2. Throughout this brief, *Amici* use the term “cisgender,” which applies to people whose “gender identity—or their deeply felt, inherent sense of their gender—aligns with their sex-assigned-at-birth,” and the term “transgender,” which refers to “people who consistently, persistently, and insistentlly express a gender that, on a binary, we would think of as opposite to their assigned sex.” *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 594 (4th Cir. 2020) (quotation marks omitted).

girls and women enjoy an unfair competitive advantage over cisgender girls and women in athletic competitions is just that: an assertion, disputed in the trial courts, that underlies the entire justification for the statutes challenged in these cases and forms the crux of Petitioners' arguments here. Only if Petitioners' factual claims are correct could this Court move on to determine whether that competitive difference bears a sufficient relationship to a state interest, evaluated at the proper level of judicial scrutiny, in barring transgender girls from girls' sports. If Petitioners' version of the facts is incorrect, however, then the Equal Protection issue that Petitioners urge this Court to decide is premature at best.

The parties' merits briefs lay bare how the legal issue before the Court turns on a pending and unresolved factual dispute. The state Petitioners based the statutes at issue on the claim of competitive advantage, and their briefs extensively set forth their supporting evidence. *See* Brief for Petitioners State of West Virginia, *et al.* 2 (asserting that transgender women and girls are “bigger, faster, and stronger” than cisgender ones); Brief for Petitioners Bradley Little, *et al.* 3 (asserting that transgender women “have long-lasting physiological advantages that persist after hormone suppression, affecting their speed, strength, and endurance in ways that compromise the fairness and safety of female athletic competitions”). By contrast, Plaintiffs' briefs describe their own countervailing evidence that such inherent advantages do not uniformly exist. *See* Brief for Respondent B.P.J. 10–11 (describing testimony of Dr. Joshua Safer); Brief for Respondent Hecox 9–10 (same).

Neither district court below made final factual findings with regard to this crucial dispute, and both

Courts of Appeals recognized the incompleteness of the factual record with regard to the athletic advantage claim. Thus, the Fourth Circuit in *B.P.J.* reversed the grant of summary judgment and remanded for additional factfinding on the “genuine dispute of material fact” about this question. *B.P.J. v. W. Va. State Bd. of Educ.*, 98 F.4th 542, 561 (4th Cir. 2024) (*B.P.J.* Pet. App. 31a). Similarly, the district court in *Hecox*—which only issued a preliminary injunction—recognized its obligation to further “weigh . . . the extent of the scientific evidence” in future proceedings. *Hecox v. Little*, 479 F. Supp. 3d 930, 982 (D. Idaho 2020) (*Hecox* Pet. App. 247a), *aff’d*, 104 F.4th 1061, 1073 (9th Cir. 2024) (*Hecox* Pet. App. 23a) (explaining that Court of Appeals reviewing grant of preliminary injunction was reviewing for an abuse of discretion and not “determin[ing] the ultimate merits of the case”).

Petitioners argue in part that this Court should use these cases to issue a ruling about what level of Equal Protection scrutiny applies to statutes banning transgender girls and women from girls’ and women’s school sports teams. But as this Court has demonstrated repeatedly through the decades, all levels of Equal Protection scrutiny require some analysis of the factual assertions underlying the putative government interest in the allegedly discriminatory statute. *See, e.g., Craig v. Boren*, 429 U.S. 190, 201 (1976) (heightened scrutiny requires analysis of the “evidentiary record”); *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 537 (1973) (rational basis scrutiny requires analysis of the “practical effect” of the governmental policy). Indeed, if Plaintiffs’ expert opinions are found to be credible and accurate, then a ban on their participation in sports would not pass even rational basis review: as this Court has held, a statute targeted at any particular class without evidence is

unconstitutionally “born of animosity.” *Romer v. Evans*, 517 U.S. 620, 634 (1996); *see also id.* at 632 (holding that a statute “imposing a broad and undifferentiated disability on a single named group” and having a “sheer breadth [that] is so discontinuous with the reasons offered for it . . . lacks a rational relationship to legitimate state interests”). Because the strength of the Petitioners’ factual assertions is determinative and essential to this Court’s accurate and complete evaluation of the Equal Protection question raised by these cases, the Court should not adjudicate the issue in the absence of additional and crucial factfinding by the courts below.

Finally, these cases also come from the only Courts of Appeals to have addressed how the Equal Protection Clause applies to statutes that categorically ban transgender girls and women from participating on girls’ and women’s sports teams, and *B.P.J.* is the only decision to address the Title IX issue.³ Deciding these cases now is thus contrary to the Court’s ordinary practice of awaiting the “percolation” of issues in the lower federal courts prior to exercising its supervisory intervention.

Acquiescing to Petitioners’ request to review these issues now, in the nascent stage of factual and legal development in which they are presented, disregards this Court’s historic role in the federal appellate process. Specifically, the Court ought not address these issues here, when the lower courts’ preliminary decisions are not in conflict with one another or with this Court’s precedents,

3. As is discussed below, the Fourth Circuit also left the factual record open on the Title IX issue, subject to remedial proceedings on remand.

and where the lower courts' judgments are subject to further proceedings on remand and thus are not based upon the kind of fully developed record that is necessary for the meaningful review that such important issues deserve. *See* SUP. CT. R. 10.

It may well be that the issues raised by these cases will warrant this Court's review at some point in the future. But the evolving legal landscape in this area means that the subject is likely to recur throughout other jurisdictions in the years to come, providing the Court with ample future opportunities to review the issue with the benefit of further factual and legal development in the lower courts. There are now twenty-seven states with laws and regulations similar to the ones challenged here. The current administration is also litigating these issues, including by challenging state statutes that permit transgender girls and women to participate on athletic teams that match their gender identity. The issues raised in these cases will therefore continue to arise in other matters, allowing the development of a broad factual and legal record that will eventually provide the Court with a suitable vehicle to weigh in should it deem that exercise of its discretion appropriate. But until that time comes, *Amici* submit that the prudent decision is for the Court to stay its hand by dismissing the writs of certiorari as improvidently granted.

ARGUMENT

I. THE COURT SHOULD DISMISS THE WRITS OF CERTIORARI AS IMPROVIDENTLY GRANTED.

The grant or denial of a writ of certiorari lies squarely in this Court’s discretion. *See Hammerstein v. Superior Ct. of Cal.*, 341 U.S. 491, 492 (1951). The Court exercises that discretion “only for compelling reasons,” which include the existence of a circuit split on an “important matter”; a Court of Appeals having “decided an important federal question in a way that conflicts with relevant decisions of this Court”; and a Court of Appeals having “decided an important question of federal law that has not been, but should be, settled by this court.” SUP. CT. R. 10. The Court’s ability to deny certiorari allows it to “allocat[e] the Court’s scarce resources” to the disputes for which its input is most valuable. *Singleton v. Comm’r of Internal Revenue*, 439 U.S. 940, 945 (1978) (opinion of Stevens, J., respecting the denial of certiorari).

Full development of the factual and legal record in the courts below is crucial to this Court’s review. Thus, even where the Court believes its precedent was “misapplied,” it appropriately denies review if the parties have not had “the opportunity to fully develop a record” and “the issue presented . . . will be better suited for certiorari with such a record.” *Hidalgo v. Arizona*, 583 U.S. 1196, 1201 (2018) (statement of Breyer, J., respecting the denial of certiorari). And even if an issue is one of “importance,” the Court has wisely stayed its hand when “further consideration of the substantive and procedural ramifications of the problem by other courts will enable [it] to deal with the issue more wisely at a later date.” *McCray v. New York*, 461 U.S. 961, 961–62 (1983) (opinion of Stevens, J., respecting the

denial of certiorari); *see also Maslenjak v. United States*, 582 U.S. 335, 354 (2017) (Gorsuch, J., concurring) (“[T]he crucible of adversarial testing on which we usually depend, along with the experience of our thoughtful colleagues on the district and circuit benches, could yield insights (or reveal pitfalls) we cannot muster guided only by our own lights.”). Thus, the Court disfavors review of cases that are in an interlocutory posture, and instead prefers to await a final judgment on a full factual record. *Moyle v. United States*, 603 U.S. 324, 336 (2024) (Barrett, J., concurring) (concurring in dismissal of writ as improvidently granted due to Court’s “miscalculation” that “further proceedings below [were] unnecessary to the Court’s resolution of the question presented”); *City of Ocala v. Rojas*, 143 S. Ct. 764, 764–65 (2023) (statement of Gorsuch, J. respecting the denial of certiorari) (explaining that even when a petition for certiorari demonstrates errors in the district court’s ruling, there is “no need for the Court’s intervention” in a case that is “in an interlocutory posture”); *Abbott v. Veasey*, 580 U.S. 1104, 1105 (2017) (statement of Roberts, C.J., respecting the denial of certiorari) (cases that are “in an interlocutory posture” or lack “a final remedial order” are “better suited for certiorari” “after entry of final judgment”).

Even when certiorari has been granted, the Court continues at the merits stage to assess whether its exercise of that discretion was appropriate. Indeed, because the certiorari stage involves only a “preliminary examination of the questions” resulting in an “inevitably cursory consideration,” *Armstrong v. Armstrong*, 350 U.S. 568, 572 (1956) (opinion of Frankfurter, J.), the “plenary consideration” that takes place at the merits stage may “shed more light on th[e] case” and counsel in favor of dismissal of the writ of certiorari as improvidently

granted. *Belcher v. Stengel*, 429 U.S. 118, 119–20 (1976) (per curiam) (citing *The Monrosa v. Carbon Black Exp. Inc.*, 359 U.S. 180, 183–84 (1959)). Thus, where “due regard for the controlling importance of observing the conditions for the proper exercise” of the Court’s jurisdiction warrants it, “the writ of certiorari should be dismissed as improvidently granted.” *Magenau v. Aetna Freight Lines, Inc.*, 360 U.S. 273, 285 (1959) (Frankfurter, J., dissenting); see also *New York v. Uplinger*, 467 U.S. 246, 251 (1984) (Stevens, J., concurring) (explaining that “[i]f a majority is convinced after studying the case that its posture, record, or presentation of issues makes it an unwise vehicle for exercising the ‘gravest and most delicate’ function that this Court is called upon to perform,” the Court should dismiss a writ of certiorari presenting constitutional issues (quoting *Blodgett v. Holden*, 275 U.S. 142, 147–48 (1927))). The Court can also dismiss individual questions in a petition while deciding other questions presented. See, e.g., *City & Cnty. of S.F. v. Sheehan*, 575 U.S. 600, 602 (2015) (“[W]e dismiss the first question as improvidently granted. We decide the second question . . .”).

Applying these principles to the two cases before the Court, *Amici* respectfully submit that the Court should dismiss the writs of certiorari as improvidently granted for the reasons described in detail below.

A. Review of the novel, fact-intensive Equal Protection question presented in these cases is premature.

The petitions in both *B.P.J.* and *Hecox* ask the Court to assess whether it is lawful under the Equal Protection Clause of the Fourteenth Amendment to bar transgender girls and women from participating on girls’ and women’s

sports teams. Petition for Certiorari in *B.P.J.* II; Petition for Certiorari in *Hecox* I. No Court of Appeals has yet definitively answered that question—including the two below, which each remanded the question to the district court for further proceedings that would include additional development of the factual record.⁴ In accordance with its ordinary exercise of discretion over its docket, the Court should not adjudicate this fact-intensive and novel constitutional question prematurely, prior to further factual development in these and other cases that will proceed in the lower courts. *See Maslenjak*, 582 U.S. at 354 (Gorsuch, J., concurring) (“This Court often speaks most wisely when it speaks last.”). This wait-and-see approach may obviate the need for the Court to address these issues; at the very least, it will serve to sharpen the legal issues presented when these cases, or ones similar to them, return to the Court for review at the appropriate time.

Indeed, this Court is particularly wary of granting premature review of novel constitutional questions. *See, e.g., Uplinger*, 467 U.S. at 251 (Stevens, J., concurring)

4. Statutes of the type under review here are of recent vintage. The March 2020 Idaho law, House Bill 500, was “a first-of-its-kind categorical ban on the participation of transgender women and girls in women’s student athletics.” *Hecox v. Little*, 104 F.4th 1061, 1068 (9th Cir. 2024) (*Hecox* Pet. App. 11a); *see* IDAHO CODE §§ 33-6201–06 (2020). West Virginia’s April 2021 statute, West Virginia House Bill 3293, followed shortly thereafter. *See B.P.J. v. W. Va. State Bd. of Educ.*, 550 F. Supp. 3d 347, 352 (S.D. W. Va. 2021) (*B.P.J.* Pet. App. 76a); W. VA. CODE § 18-2-25d. It is therefore unsurprising that these two cases were the very first ones to reach the Courts of Appeals challenging state bans on transgender girls’ and women’s participation on sports teams that match their gender identity, prior to consideration of this issue in any other federal appellate courts.

(justifying dismissal of writ as improvidently granted based on “[t]he policy of judicial restraint” in reviewing a statute’s constitutionality); *Clinton v. Jones*, 520 U.S. 681, 690 (1997) (noting that this Court has “often stressed the importance of avoiding the premature adjudication of constitutional questions”); *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944) (“If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.”). Thus, “[i]t has long been [this Court’s] considered practice not to decide . . . any constitutional question in advance of the necessity for its decision, or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, or to decide any constitutional question except with reference to the particular facts to which it is to be applied.” *Ala. State Fed’n of Labor v. McAdory*, 325 U.S. 450, 461 (1945) (citations omitted). As Justice Stevens wrote:

A decision on the merits . . . [has] serious consequences, particularly when a constitutional issue is raised, and most especially when the constitutional issue presents questions of first impression. . . . Fundamental principles of constitutional adjudication counsel against premature consideration of constitutional questions and demand that such questions be presented in a context conducive to the most searching analysis possible.

Uplinger, 467 U.S. at 251 (Stevens, J., concurring).

The Court has repeatedly emphasized that it is premature to adjudicate legal issues when the factual record is unsettled. *See, e.g., Hidalgo*, 583 U.S. at 1201 (statement of Breyer, J., respecting the denial of certiorari) (explaining that issues are better suited for certiorari when the necessary facts have been fully developed in the courts below); *Nike, Inc. v. Kasky*, 539 U.S. 654, 664–665 (2003) (Stevens, J., concurring) (agreeing with the majority’s decision to dismiss a writ as improvidently granted where the correct answer to questions integral to the case was “more likely to result from the study of a full factual record”). There is good reason to exercise such restraint: “[a] law which is constitutional as applied in one manner may . . . violate the Constitution when applied in another.” *Ala. State Fed’n of Labor*, 325 U.S. at 461–62 (noting that this Court has a longstanding policy of avoiding adjudication of “any constitutional question except with reference to the particular facts to which it is to be applied”). The Court therefore prefers “a factual record” so that it can avoid “broad rules” that risk creating “‘untoward practical ramifications’ not foreseen at the time of decision.” *Gates*, 462 U.S. at 224 (quoting *Mapp v. Ohio*, 367 U.S. 643, 676 (1961) (Harlan, J., dissenting)). Indeed, the Court has repeatedly stressed the importance of a fully developed factual record and complete appellate process before deciding novel and fact-intensive constitutional questions. *See, e.g., Spears v. United States*, 555 U.S. 261, 270 (2009) (Roberts, C.J., dissenting) (“We should not rush to answer a novel question” that “could benefit from further attention in the courts of appeals . . . in the absence of a pronounced conflict among the circuits.”); *Yee v. City of Escondido*, 503 U.S. 519, 538 (1992) (“Prudence also dictates awaiting a case in which the issue was fully litigated below, so that we will have the benefit of developed arguments on both

sides and lower court opinions squarely addressing the question.”); *United States v. Mendoza*, 464 U.S. 154, 160, 163 (1984) (describing “the benefit [this Court] receives from permitting . . . courts of appeals to explore a difficult question before this Court grants certiorari”).

In both of the cases at hand, the “precise set of facts” necessary for this Court to decide the Equal Protection question presented has not yet been fully developed. *Ala. State Fed’n of Labor*, 325 U.S. at 462. In *B.P.J.*, the parties agreed that “the central question for B.P.J.’s as-applied Equal Protection challenge is whether excluding her from the girls cross country and track teams is substantially related to the concededly important government interest in competitive fairness.” 98 F.4th at 559 (*B.P.J.* Pet. App. 31a). In addressing this dispute, both parties filed expert reports on one of the critical issues in the case: whether, “[e]ven without undergoing Tanner 2 stage puberty . . . people whose sex is assigned as male at birth enjoy a meaningful competitive athletic advantage over cisgender girls[.]” *Id.* at 561 (*B.P.J.* Pet. App. 34a). B.P.J.’s expert opined that the answer was no; the defendants (Petitioners in this Court), on the other hand, “submitted an expert report contradicting the assertions by B.P.J.’s experts.” *Id.* (*B.P.J.* Pet. App. 34a–36a). The Fourth Circuit therefore identified “a genuine dispute of material fact about this question” that precluded the trial court from granting summary judgment to either party. *Id.* (*B.P.J.* Pet. App. 34a). The Court of Appeals acknowledged that both parties had cross-moved to exclude the others’ expert testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), but that the trial court had not ruled on those motions. Of course, adjudication of those motions might have eliminated any

factual dispute, and so the Fourth Circuit, mindful of the principle that “questions about the admissibility of evidence are uniquely within the province of trial courts,” determined that it was required to “remand for further proceedings, including consideration of the still-pending *Daubert* motions.” *B.P.J.*, 98 F.4th at 562 (*B.P.J.* Pet. App. 36a–37a).

Similar factual disputes persist in *Hecox*, which is at an even earlier stage of the litigation: an appeal from the grant of a preliminary injunction. See *Brown v. Chote*, 411 U.S. 452, 457 (1973) (deferring review of the “grave, far-reaching constitutional questions presented” on interlocutory review of a preliminary injunction where the “case clearly reflects the limited time which the parties had to assemble evidence and prepare their arguments”); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 786 n.1 (1986) (White J., dissenting) (“[R]esolv[ing] an appeal from the grant or the denial of a preliminary injunction by issuing a final judgment as to the constitutionality of a statute . . . is by no means the preferred course of action in the run of cases.”), *overruled on other grounds by Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992). As in *B.P.J.*, the parties in *Hecox* presented competing expert testimony. *Hecox*’s expert opined that “physiological advantages are not present when a transgender woman undergoes hormone therapy and testosterone suppression,” while Petitioners’ expert responded that “hormone and testosterone suppression cannot fully eliminate physiological advantages once an individual has passed through male puberty.” *Hecox*, 479 F. Supp. 3d at 979–980 (*Hecox* Pet. App. 242a). In granting a preliminary injunction, the District Court specifically highlighted the possibility of “further development of the record” in future proceedings. *Id.* at 978

(*Hecox* Pet. App. 239a). The court accordingly explained that those further proceedings would require it to “hear testimony from the experts at trial and weigh both their credibility and the extent of the scientific evidence.” *Id.* at 982 (*Hecox* Pet. App. 247a); *see also id.* at 985 (*Hecox* Pet. App. 253a) (“[A]t this stage, the Court only discusses the ‘likelihood’ of success based on the information currently in the record. Actual success—or failure—on the merits will be determined at a later stage.”). The Ninth Circuit, reviewing the injunction, explained that it also was not “determin[ing] the ultimate merits of the case.” *Hecox*, 104 F.4th at 1073 (*Hecox* Pet. App. 23a).

The lower court opinions in both *B.P.J.* and *Hecox* thus recognize a reality undergirding Equal Protection claims: they are fact-intensive. Application of heightened scrutiny, in particular, requires the party defending the action to “demonstrate an ‘exceedingly persuasive justification’ for that action.” *United States v. Virginia*, 518 U.S. 515, 531 (1996) (quoting *Miss. Univ. for Women*, 458 U.S. 718, 724 (1982)). Accordingly, the state “must not rely on overbroad generalizations,” *Id.* at 533, and therefore cannot win if it fails to “support [its] conclusion” that there is a substantial relationship between the governmental objective and the means chosen to achieve that objective, *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 139 (1994); *see also id.* at 139 n.11 (“The Equal Protection Clause . . . requires that state actors look beyond the surface before making judgments about people that are likely to stigmatize as well as to perpetuate historical patterns of discrimination.”). Thus, even if the governmental interest is “important,” the Court has held that governmental policies seeking to serve that interest fail Equal Protection scrutiny where the “*evidentiary record*” is “unpersuasive[.]” *Craig*, 429 U.S.

at 200–01 (emphasis added). This Court’s cases emphasize the factual nature of this inquiry, thoroughly examining the facts before it in order to determine whether the means of a statute or policy are sufficiently related to an important governmental interest. *See, e.g., Virginia*, 518 U.S. at 534 (“[m]easuring the record in this case against the review standard just described” to determine that Virginia Military Institute violated Equal Protection Clause in denying admission to women); *Miss. Univ. for Women*, 458 U.S. at 731 (concluding that “the record in this case is flatly inconsistent with the claim” that challenged policy “is necessary” to meet governmental interests); *Craig*, 429 U.S. at 204 (evaluating evidence in support of statute prohibiting sale of beer to males, but not females, between 18 and 20 years of age and concluding that “the relationship between gender and traffic safety [is] far too tenuous to satisfy” Equal Protection scrutiny). Here, however, the record in both cases before the Court is not yet complete, making review of the application of this Equal Protection standard to these cases impossible. The Court should therefore dismiss the writs as improvidently granted, allowing the Court to reconsider the issue presented in a future case on a full and complete record that permits application of the relevant level of Equal Protection scrutiny. *See Jones v. State Bd. of Educ.*, 397 U.S. 31, 31 (1970) (per curiam) (dismissing writ as improvidently granted because “on closer review of the record,” the case became “an inappropriate vehicle for this Court’s first decision on” the constitutional issue presented).

Petitioners resist the need for further factual development in these cases in part by arguing that the Court should apply rational basis scrutiny instead of the

heightened scrutiny that both Courts of Appeals applied to these cases. But even the more deferential rational basis standard requires an analysis of the record to determine whether the challenged policy actually serves the putative governmental interest at play. States may not simply concoct reasons to distinguish among their citizens and claim such reasons are rational without some evidentiary basis. That is why this Court has struck down policies where there is no “factual context from which [the Court] could discern a relationship to legitimate state interests,” *Romer*, 517 U.S. at 635, or where the record did not dispel the claim that the chosen means were “irrelevant” to the governmental interest, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985), or where the “practical effect” of the policy “d[id] not operate rationally to further” the governmental interest, *Moreno*, 413 U.S. at 537. In any event, the full development of the factual record may make it clear that, as Petitioners argue at length, these laws survive any measure of Equal Protection scrutiny because all transgender girls and women have inherent athletic advantages over cisgender ones. Brief for Petitioners State of West Virginia, *et al.* 11–12, 45; Brief for Petitioners Bradley Little, *et al.* 6–12, 45–46. But that is simply a way of acknowledging that the Equal Protection issue in these cases does not turn on legal questions properly and clearly presented to the Court; instead, the inquiry depends on factual determinations still pending in the courts below. Thus, any presumption on the part of this Court, at the certiorari stage, “that further proceedings below [were] unnecessary to the Court’s resolution of the question presented” was “a miscalculation.” *Moyle*, 603 U.S. at 336 (Barrett, J., concurring). Accordingly, this Court “should dismiss the writ[s] of certiorari as improvidently granted and permit

proceedings to run their course in the courts below,” *id.* at 337, subject to a future assessment of whether a grant of certiorari is justified if this issue comes to the Court again on a fuller factual record.

In addition to factual development, dismissing the grants of certiorari on the Equal Protection issue at this time allows for further legal developments in the lower courts that might affect this Court’s review. For example, lower courts should initially address the question of how this Court’s recent decision in *United States v. Skrmetti*, 605 U.S. 495 (2025), issued after both Court of Appeals opinions under review here, alters the analysis of the Equal Protection question. *Cf. D.H. v. Williamson Cnty. Bd. of Educ.*, 2024 U.S. Dist. LEXIS 158653 (M.D. Tenn. Sept. 4, 2024) (granting reconsideration and dismissing complaint filed by transgender girl regarding bathroom policy following the Sixth Circuit’s opinion in *Skrmetti*). Petitioners’ merits briefs are filled with voluminous citations to *Skrmetti*, arguing that the majority and concurring opinions in that case materially affect the legal analysis in these cases. Brief for Petitioners State of West Virginia, *et al.* 38–41, 48–49; Brief for Petitioners Bradley Little, *et al.* 25, 27, 28, 36–40. But of course, neither the trial courts nor the Courts of Appeals had the benefit of those opinions when adjudicating the legal issues presented here. Arguments about the impact of *Skrmetti* on these cases, and others similar to them, should be addressed to the lower federal courts in the first instance so that this Court can benefit from legal developments in those cases prior to exercising its discretion to engage in its own review. *See Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam) (explaining Court’s practice of using a grant, vacate, and remand

(GVR) order “[w]here intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation”); *Mast v. Fillmore Cnty.*, 141 S. Ct. 2430, 2430 (2021) (Gorsuch, J., concurring) (explaining decision to grant, vacate, and remand in light of intervening Supreme Court ruling). That approach would not, of course, preclude this Court from reviewing the cases following a remand if appropriate. *See, e.g., Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 76–77 (2012) (describing grant of certiorari following opinion on remand to Court of Appeals to consider intervening Supreme Court decision); *Tennard v. Dretke*, 542 U.S. 274, 282 (2004) (same). But it would respect this Court’s usual practice of first allowing lower courts to address such issues before wading in itself.

Finally, there is no circuit split on the application of heightened scrutiny as opposed to rational basis scrutiny to statutes like the ones at issue here. *Cf. Braxton v. United States*, 500 U.S. 344, 347 (1991) (“A principal purpose for which we use our certiorari jurisdiction, and the reason we granted certiorari in the present case, is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law.”); *Mistretta v. United States*, 488 U.S. 361, 371 (1989) (granting certiorari because of the “disarray” among the federal district courts). The Fourth and Ninth Circuits are the only Courts of Appeals to have addressed Equal Protection challenges to statutes prohibiting transgender girls and women from participating on girls’ or women’s sports teams, and they

both have applied heightened scrutiny. Even considering the issue of Equal Protection as applied to transgender individuals more broadly, the Courts of Appeals have for many years been considering Equal Protection challenges to policies prohibiting transgender individuals from utilizing bathrooms that match their gender identities, and every Court of Appeals to consider such challenges (regardless of whether the policy was upheld or rejected) has applied heightened scrutiny. *See Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 803 (11th Cir. 2022) (en banc) (upholding policy under heightened scrutiny); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 607–09 (4th Cir. 2020) (rejecting policy under heightened scrutiny); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1050–51 (7th Cir. 2017) (rejecting policy under heightened scrutiny); *see also A.C. by M.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 768 (7th Cir. 2023) (following *Whitaker* and rejecting policy under heightened scrutiny). Given this absence of a circuit split, the Court is not called upon to weigh in on this issue, especially while the facts are still subject to further development after remand. *See Layne & Bowler Corp. v. W. Well Works, Inc.*, 261 U.S. 387, 392–93 (1923) (dismissing a writ of certiorari as improvidently granted upon finding that “the conclusions in the two circuits . . . were really in harmony and not in conflict” such that “there was no ground for [the Court] allowing the writ of certiorari to add to an already burdened docket”).

Put simply, the Court should not prematurely address the Equal Protection issue in these cases. Instead, it should allow for future factual development and legal proceedings—including adding further “insights” or potential “pitfalls”—so that this issue can be more

appropriately and meaningfully considered when it next arrives on the Court’s doorstep. *Maslenjak*, 582 U.S. at 354 (Gorsuch, J., concurring). Waiting for other courts to more fully consider these issues may demonstrate that the issues presented in these cases, even if they “seem[] grave and intractable at first blush,” can “be fully and adequately resolved by the lower courts.” See Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 158 (2019). On the other hand, deciding these cases in an interlocutory posture, prior to those developments, risks forcing this Court into the untenable circumstance of ruling on questions it need not have decided. See *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 348 (2022) (Roberts, C.J., concurring in the judgment) (“If it is not necessary to decide more to dispose of a case, then it is necessary *not* to decide more.”).

This Court should therefore dismiss the writs of certiorari on the Equal Protection issue as improvidently granted, subject to its discretion to reconsider whether to grant certiorari in these cases—or others like them—after further development in the lower federal courts.

B. Review of the Title IX question in *B.P.J.* is premature while the issue continues to be subject to review in the lower federal courts.

In addition to the Equal Protection issue, Petitioners in *B.P.J.* ask this Court to decide whether West Virginia’s categorical ban on transgender girls participating on girls’ sports teams violates Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688.⁵ As with the

5. Petitioners frame the question more broadly than the scope of the decision below. Petitioners invite this Court to decide

Equal Protection claim, the Title IX claim still requires further factual development regarding the question of whether (and, if so, when) transgender girls and women have inherent athletic advantages over cisgender ones, because the Fourth Circuit remanded for “remedial proceedings” that will address precisely that issue. *B.P.J.*, 98 F.4th at 562 (*B.P.J.* Pet. App. 38a); *see* Brief for Respondent *B.P.J.* 24 n.7, 38 n.16.

To be sure, on the question of liability, the Fourth Circuit ruled that there was no dispute of material fact and held that the district court should have granted summary judgment to *B.P.J.* *B.P.J.*, 98 F.4th at 563 (*B.P.J.* Pet. App. 38a). Nonetheless, this Court should dismiss the writ of certiorari as improvidently granted with respect to the Title IX issue, as well, based upon the Court’s longstanding practice, discussed above, of reviewing only those cases which present issues that have been subject to review by multiple lower courts. By contrast, this case represents the first and only instance in which a Court of Appeals has addressed the legal issue of whether Title IX prohibits denying a transgender girl who has not gone through “Tanner 2” stage puberty the ability to participate on a girls’ sports team. Consequently, review at this early stage on the Title IX issue would be premature and inappropriate.

“[w]hether Title IX prevents a state from consistently designating girls’ and boys’ sports teams based on biological sex determined at birth.” Petition for Certiorari in *B.P.J.* I. But the case has only ever involved as-applied challenges to the Act, and the courts below accordingly ruled only on the as-applied challenges. Indeed, “[n]o other transgender girl is known to be affected by H.B. 3293 other than *B.P.J.*” Brief in Opposition to Certiorari in *B.P.J.* 1.

As noted, this Court typically grants petitions for writs of certiorari in cases involving legal issues that have been considered by several Courts of Appeals. *See Box v. Planned Parenthood of Ind. & Ky., Inc.*, 587 U.S. 490, 493 (2019) (per curiam) (“We follow our ordinary practice of denying petitions insofar as they raise legal issues that have not been considered by additional Courts of Appeals.”); *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951) (certiorari is granted “in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal” (quoting *Layne & Bowler Corp.*, 261 U.S. at 393)); SUP. CT. R. 10(a) (a petition for a writ of certiorari may be granted if “a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter”). Indeed, this Court often grants petitions for writs of certiorari specifically to resolve splits of authority among the Courts of Appeals. *See, e.g., Loughrin v. United States*, 573 U.S. 351, 355 (2014) (granting certiorari to resolve circuit split on whether a federal statute requires the government to make a specific showing of intentional defrauding); *United States v. Castleman*, 572 U.S. 157, 162 (2014) (granting certiorari where there was a “deepened” split of authority among the Courts of Appeals regarding the meaning of force under a federal statute); *Sinochem Int’l Co. v. Malay. Int’l Shipping Corp.*, 549 U.S. 422, 428–29 (2007) (granting certiorari to resolve a conflict among the circuits on whether *forum non conveniens* can be decided prior to jurisdictional issues). By contrast, when “[o]nly a few Courts of Appeals have weighed in on” the legal issue, certiorari is inappropriate because the issue “would benefit from further percolation in the lower courts prior to this Court’s intervention.” *Baker v. City of McKinney*, 145 S. Ct. 11, 13 (2024) (Sotomayor, J., concurring).

Here, too, the Court would benefit from such “percolation” prior to its consideration of how Title IX applies to laws that bar transgender girls from participating on girls’ sports teams. As noted above, this case is the first and only case of its kind to have been addressed by any Court of Appeals. *See* Brief in Opposition to Certiorari in *B.P.J.* 15. Accordingly, a major, and often dispositive, factor, for this Court to grant certiorari—a circuit split—is not implicated by the Title IX issue in this case. *See Bunting v. Mellen*, 541 U.S. 1019, 1021 (2004) (opinion of Stevens, J., respecting the denial of certiorari) (“the absence of a direct conflict among the Circuits” justifies denial of certiorari). Accordingly, if this Court wishes to exercise its reviewing power with respect to Title IX’s protections in the context of school sports, it should do so only once the law on this issue has further developed.⁶

6. Petitioners argue that the decision below on the Title IX issue “exacerbates a split over whether schools can divide the sexes based on biological differences.” Petition for Certiorari in *B.P.J.* 23. But they only cite cases concerning how Title IX applies to bathrooms, not sports. Those cases continue to be litigated in Courts of Appeals around the country. *See A.C. ex rel. M.C. v. Metro. Sch. Dist. of Martinsville*, No. 25-1094 (7th Cir.); *Doe v. South Carolina*, No. 25-1787 (4th Cir.). Thus, the Court will have the opportunity to address that issue in a future case. The subject matter of this case, however, is one entirely of first impression, which has not yet percolated—and as to which there is no such split—in the lower courts.

C. The Court is likely to encounter future, superior vehicles to address the issues presented in these cases with more complete records and after sufficient review in the lower federal courts.

Although *Amici* respectfully submit that the Court should dismiss the writs of certiorari in these cases, they also acknowledge the importance of the issues presented. But even “on an issue of such importance,” the Court should not adjudicate the issue without the benefit of a full factual and legal record. *Moyle*, 603 U.S. at 336–37 (Barrett, J., concurring); *see also Baker*, 145 S. Ct. at 13 (Sotomayor, J., concurring) (denial of certiorari is appropriate even on “an important and complex question” where the issue has not been subject to sufficient “percolation”).

That said, should the Court later wish to address the issues presented in these cases, it can be confident that the appropriate case will arise in the future. Indeed, Petitioners’ own briefing identifies several avenues that could well result in such a case. First, in addition to West Virginia and Idaho, there are now twenty-seven other state laws or regulations that prohibit transgender girls and women from participating in school sports with cisgender women. Brief for Petitioners State of West Virginia, *et al.* 8; Brief for Petitioners Bradley Little, *et al.* 20. And President Trump’s Executive Order 14201 additionally pledges to raise these issues, including by engaging in affirmative litigation against policies that permit transgender girls and women from participating on sports teams that match their gender identity. Exec. Order No. 14,201, 90 Fed. Reg. 9,279 (Feb. 5, 2025); *see United States v. Cal. Interscholastic Fed.*, No. 8:25-cv-

01485 (C.D. Cal.) (lawsuit alleging that California’s Sex Equity in Education Act violates Title IX); *United States v. Me. Dep’t of Educ.*, No. 1:25-cv-00173 (D. Me.) (lawsuit alleging that Maine’s Human Rights Act violates Title IX).

These legal and policy changes, as a practical matter, guarantee future litigation regarding the lawfulness of prohibiting (or allowing) transgender athletes to participate in girls’ and women’s sports. Meanwhile, the Court should, in a sound exercise of its discretion, await the development of a complete factual and legal record on these important issues prior to deciding them and pronouncing a sweeping ruling that will bind the lower courts for the foreseeable future.

* * *

In sum, ruling now in an interlocutory posture on the evolving records in these two cases would do “a disservice to [the Court’s] own appellate processes, which serve both to constrain and legitimate the Court’s authority.” *Merrill v. Milligan*, 142 S. Ct. 879, 889 (2022) (Kagan, J., dissenting), *stay vacated*, *Allen v. Caster*, 143 S. Ct. 2607 (2023) (Mem.). By contrast, dismissing these writs of certiorari as improvidently granted will allow the judicial process to function as it should, ultimately presenting the Court an opportunity for “final review” instead of demanding of it a “first view,” which it nearly always refuses to, and ought not, provide. *Zivotofsky*, 566 U.S. at 201 (quoting *Adarand Constructors*, 534 U.S. at 110).

CONCLUSION

The writs of certiorari should be dismissed as improvidently granted.

Respectfully submitted,

KENT GREENFIELD
BOSTON COLLEGE LAW SCHOOL
885 Centre Street
Newton, MA 02459

LAWRENCE S. LUSTBERG
Counsel of Record
MICHAEL R. NOVECK
RUTH O'HERRON
MADHULIKA MURALI
GIBBONS P.C.
JOHN J. GIBBONS FELLOWSHIP
IN PUBLIC INTEREST AND
CONSTITUTIONAL LAW
One Gateway Center
Newark, NJ 07102
(973) 596-4500
llustberg@gibbonslaw.com

Counsel for Amici Curiae

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